

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

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KENNETH M. SEATON d/b/a	:	
GRAND RESORT HOTEL AND	:	3:11-cv-00549
CONVENTION CENTER,	:	
	:	
Plaintiff,	:	
	:	
- against -	:	
	:	
TRIPADVISOR, LLC,	:	
	:	
Defendant.	:	
-----	x	

**DEFENDANT TRIPADVISOR, LLC'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF ITS MOTION TO STRIKE OR
DISREGARD THE AFFIDAVIT OF CHRISTOPHER EMMINS**

Defendant TripAdvisor, LLC ("TripAdvisor") submits this reply memorandum in further support of its motion to strike or disregard the Emmins Affidavit (the "Motion to Strike").

In his response to the Motion to Strike, Plaintiff altogether fails to address TripAdvisor's grounds for striking or, in the alternative, disregarding the Emmins Affidavit. Instead, Plaintiff merely urges the Court, once again, to convert the motion to dismiss to one for summary judgment. *See* Doc. 23, at 2 ("The Plaintiff is entitled to have a jury consider the facts [in the Emmins Affidavit], as they provide genuine issues of material fact about [TripAdvisor's 2011 "Dirtiest Hotels" list]"). In so doing, Plaintiff repeats the very same incorrect assertion from his response to TripAdvisor's motion to dismiss, that:

TripAdvisor, despite its insistence that the '2011 Dirtiest Hotels' list is appropriate for consideration without converting the motion to one for summary judgment, *is nevertheless asking this Court to consider many underlying details surrounding the objectivity and verifiability of the "2011 Dirtiest Hotels" list* in ruling on the matter of dismissal.

Doc. 23, at 1 (emphasis added); *see also* Doc. 15, at 19 (stating the same, almost verbatim).

As Plaintiff surely knows, however, it is *Plaintiff* – and *not* TripAdvisor – who is “asking this Court to consider many underlying details surrounding ... the ‘2011 Dirtiest Hotels’ list” (*i.e.*, the Emmins Affidavit), in an effort to avoid dismissal of his Complaint on a purely legal ground – that the “Dirtiest Hotels” list is, as a matter of law, non-actionable protected opinion. TripAdvisor made its motion under Rule 12(b)(6), based on the pleadings alone. Its *only* submission in support of its motion to dismiss was the very statement that constitutes the basis of Plaintiff’s defamation claim, which is considered *part of* – not outside – the pleadings (*see, e.g.*, Doc. 8, at 4, n.3); there are no “underlying details” that are necessary for the Court to consider in order to decide the motion. Plaintiff may not have the Rule 12(b)(6) motion converted to summary judgment simply by submitting material that is outside the pleadings and irrelevant to the purely legal question of whether the “Dirtiest Hotels” list is opinion or fact. *See* Doc. 22, at 2-3 (citing cases where courts rejected plaintiff attempts to submit extraneous material in opposition to Rule 12(b)(6) dismissal motions, while considering defendant submissions referred to in the complaints and central to the claims).

The Emmins Affidavit is neither incorporated by reference in the Complaint nor central to Plaintiff’s defamation claim. Indeed, Plaintiff does not argue otherwise. Accordingly, TripAdvisor respectfully submits that the Motion to Strike should be granted, and the Emmins Affidavit stricken from consideration on TripAdvisor’s motion to dismiss the Complaint for failure to state a claim.

Respectfully submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ

By: s/S. Russell Headrick

S. Russell Headrick (BPR No. 005750)

Meghan H. Morgan (BPR No. 024619)

265 Brookview Centre Way, Suite 600

Knoxville, Tennessee 37919

(865) 549-7200 (direct phone)

(865) 525-8569 (direct fax)

E-mail: rheadrick@bakerdonelson.com

mhmorgan@bakerdonelson.com

Attorneys for TripAdvisor, LLC

Of Counsel:

James Rosenfeld (admitted *pro hac vice*)

jamesrosenfeld@dwt.com

Samuel M. Bayard (admitted *pro hac vice*)

samuelbayard@dwt.com

DAVIS WRIGHT TREMAINE LLP

1633 Broadway, 27th Floor

New York, New York 10019

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2012, a true and correct copy of the foregoing documents was electronically filed with the United States District Court for the Eastern District of Tennessee, and was served on all counsel by the court's electronic filing notification or via email.

s/S. Russell Headrick

S. Russell Headrick